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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS SALAZAR JUAREZ,

Defendant and Appellant.

G045545

(Super. Ct. No. 08NF0756)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard W. Stanford, Jr., Judge. Affirmed.

Harry Zimmerman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, James D. Dutton and Donald W. Ostertag, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Luis Salazar Juarez of second degree robbery and being a convicted felon in possession of a loaded firearm. The jury found true an allegation Juarez personally used a firearm during the commission of the robbery. The court found true allegations Juarez had been previously convicted of a violent or serious felony (Pen. Code, § 667, subd. (a)(1)),¹ which also qualified as a “strike” prior under the “Three Strikes” law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(e)), and sentenced Juarez to a total prison term of 21 years.

Juarez claims the trial court abused its discretion by denying his *Marsden*² motion, failing to dismiss his strike prior pursuant to section 1385, subdivision (a), and sentencing him to a 21-year prison term without properly considering his mental illness. In the alternative, Juarez claims the cumulative impact of these errors requires this court to reverse the judgment. We find none of these claims meritorious and affirm.

FACTS

One March evening in 2008, Gabriel Padayo and his pregnant fiancée drove to a gas station. Padayo pulled into the station and parked behind Juarez’s truck at the pump. Padayo got out of his car, extracted some cash from his wallet, put money into the pump, and started to pump gasoline into his car. As he did so, Padayo noticed Juarez staring at him. Juarez paced around and Padayo heard him muttering and swearing under his breath. Padayo thought Juarez might have been talking to someone on the telephone, or perhaps to a nearby patron of the station. However, when the patron Padayo thought Juarez might have been talking to drove away, Juarez became even more agitated.

When Juarez finished pumping gas into his truck, he drove around to the other side of the pumps and stopped about 10-to-15 feet away from Padayo. Padayo continued to pump gas. He suddenly noticed there were no other cars around him and no

¹ All further statutory references are to the Penal Code.

² *People v. Marsden* (1970) 2 Cal.3d 118.

customers in the store. Then, Padayo heard Juarez say, “hey, fucker, come over here,” and he saw Juarez, gun in hand, make a motion for him to come over. Despite his fear, Padayo refused Juarez’s invitation. Juarez then pointed the gun at him and said, “Give me all your money or I’ll shoot you.” At this point, Padayo decided to comply with Juarez’s demand for his own safety and for that of his fiancée. Padayo told Juarez he only had \$10 and held out a \$10 bill. Juarez got out of his truck, pointed the gun at Padayo, and took the \$10 bill. As Juarez got back into his truck, he said, “don’t try anything or I’ll shoot you.” Padayo also heard Juarez say “something to the nature of ‘you know, that’s how fuckers get shot around here[.]’” Padayo watched as Juarez drove out of the gas station, made a U-turn, and drove into another gas station across the street.

When he got back into his own car, Padayo learned that his fiancée had called the police. Padayo followed the police officers as they pursued Juarez and stopped him just before he entered a freeway on-ramp. Padayo identified Juarez at the scene.

Anaheim Police Officer Matthew Budds participated in Juarez’s arrest. He took possession of a loaded, Smith & Wesson five-shot revolver he found on the front seat of Juarez’s truck.

Juarez testified on his own behalf. The parties stipulated that Juarez had been convicted of a felony prior to the instant crimes. On direct examination, Juarez told the jury that in 2007 a cousin of his had been killed under suspicious circumstances after he sold a \$30,000 Harley Davidson motorcycle to someone in a motorcycle gang. As Juarez explained, he and his cousin “lived together and [they] had some businesses. We were diesel mechanics and tire people. He told me to drive a motorcycle that he had sold, so I delivered it to that person. And when my cousin died, the person who owed the money on the motorcycle never paid for it. So, I called to -- so that he could pay the money. So, what I think is that person hired some people” Juarez said he thought someone driving a white truck had followed him into the gas station, and he became concerned when Padayo exchanged some words with this person. He testified, “I got

angry because [Padayo] went towards the guy in the white truck. And in my mind, I thought these are the two guys that are following me with other people.”

Juarez decided to talk to Padayo after the other patron left the station. He grabbed his gun and got out of his truck. Juarez testified, “I was afraid my life was in danger.” He thought Padayo reached for a gun and he demanded Padayo put up his hands. However, he denied demanding Padayo’s money, claiming, “if I wanted to rob him, I would have robbed somebody else. I don’t do that. I don’t do that for a living.”

DISCUSSION

Ruling on Marsden Motion

One week before trial, Juarez asked the court to substitute appointed counsel. During the closed *Marsden* hearing, Juarez complained to the court his attorney, who was female and African-American, failed to make scheduled appointments with him. He also told the court, “[a]nd even though I know she’s a good attorney, I just don’t feel that connection. There are a couple of points that she hasn’t mentioned that other lawyers had mentioned previous to me, and that hasn’t come up in our conversation. [¶] And not that I’m a racist or that she’s a racist, but a lot of my history has to do with some black people, and so when she asked me to sit down and write all this out it’s just I know I don’t – I really can’t do that. [¶] There is one other thing. . . . Prior with my other lawyers whenever I’ve had a doctor’s appointment I’ve read it and had to sign something. This last time I was told the district attorney had read it and I hadn’t signed anything.” He also complained because the prosecution had offered a 17-year sentence in exchange for a guilty plea before trial, but more recently the offer was increased to 19 years.

On the issue of race, the court asked Juarez to elaborate on his concern. Juarez responded, “Well, there are black people mixed into my case from the very beginning, so when I try to tell her my story at the beginning with all of this she just said, ‘Well, just write it all out in a note and then you can show it to me later.’ I didn’t say anything at that moment, but I felt something. I took to heart what she said. I understand

that they're busy and occupied, but at the same token I'm locked up and I have a lot of time to think as well."

When questioned by the court, trial counsel said she had been assigned Juarez's case in October 2010. She stated, "When I received the file I pulled the court's minutes, reviewed the case history, and spent a lot of time going through the file. Lots of medical records, police reports, investigations that have been done. And I noted that on March 26 of 2010 Mr. Juarez had entered a not guilty plea by reason of insanity. And I was not the lawyer when that occurred. Two doctors were appointed, Dr. Thomas and Dr. Ward. Dr. Ward's report had been completed and had found Mr. Juarez to not qualify under that [section] 1026 standard. There was no second report having been completed by Dr. Thomas. [¶] I spent a lot of efforts calling her, tracking her down, trying to get her to go visit Mr. Juarez, to complete that report. She did not submit that report to the court until January 21st of 2011. [¶] When I first got the case I did visit Mr. Juarez to make sure he knew I was his lawyer. I went over the case with him. There were several interviews in the file, very detailed interviews by prior lawyers. So I just went over those with him just to see if there was anything different or any changes. I explained to him the charges, what his exposure was. I again went over the insanity plea and, you know, the significance of it to make sure he understood that since I wasn't the lawyer at the time that was entered. [¶] It was a good visit. Then, you know, he did mention that there was an appointment that he said I didn't keep. I actually have a practice of not making appointments with clients, especially if they're in custody, because the way our schedules are I could be in trial, I could be called out to another hearing. But what I do is tell the client, 'This is my timeframe, and this is when I hope to be able to come and see you.' [¶] And when I first met Mr. Juarez I said, 'I would like to come and visit you next once I get Dr. Thomas's report so that we can discuss that in detail.' Because in terms of the insanity plea, you know, that was going to be important discussions between the two of us to see how to proceed. I didn't get the report until

January 21st, and I actually didn't get it until I was in court on that day. [¶] And that report also said he didn't qualify for the standard of legal insanity, so I wanted to go and talk to him about that. So I did have a jail visit with him, and we went over, you know, the issues clearly that have arisen now that I didn't have a doctor to support that 1026 plea. [¶] So what I did next, based on that, is Dr. Thomas had mentioned something in her report that Mr. Juarez might have some kind of organic brain damage or brain damage, and so what I did is I took some time to arrange and I got the approval for the funding to do testing. I hired a doctor, and so I had to get an order, a confidential order, for transport to have him actually transported from the jail to the doctor's office for the interview and then for all the testing in order to get him an [magnetic resonance imaging] M.R.I. and a [computed tomography] CAT scan and, you know, some neurological testing done, the results of which aren't quite finished since he was only – that only occurred March 30 of 2011. [¶] I have visited him at the jail three times. My practice is I generally visit clients more than probably is needed just so that they can know that I'm working on their case and so that, you know, we can keep lines of communication open. But my general practice is I try to see everybody once a month even though that may not be necessary. [¶] If I see somebody in court I have the opportunity to talk to them and sometimes I don't make a jail visit that month, but I've seen him pretty much since I've had the case at least once a month. And they're very long visits. [¶] I had asked him the last time I did see him – actually, the second to the last time I saw him – to actually write down some of his thoughts because sometimes I feel that clients do a much better job writing down because I'm losing some of the stuff because I'm trying to talk to them and they're talking real fast. So if the client actually writes it down and I value everything the client says sometimes I think it's better they get to say more if they put it on paper, so that's why I had suggested that to Mr. Juarez. I didn't mean for him to take that as me not caring or, you know, anything negative. It was a positive. I value what he's saying. It was so important I wanted him to write it down. [¶] He did mention to me that he

doesn't write in English. And that was after the fact. He didn't tell me that at the time. But I suggested to him that he write in Spanish, and I explained to him that we have ready and available Spanish-speaking investigators and interpreters that are always around and that he should never feel uncomfortable writing a letter in Spanish because I can have it translated or leaving a message in Spanish because we have no lack or shortage of investigators or staff that speak Spanish. And, in fact, the investigator on this case is a Spanish speaker. [¶] Investigation. We have done investigation on the case. I have myself. Mr. Juarez had mentioned – because there was a robbery aspect involved in the case, Mr. Juarez had mentioned that he was working and he was affiliated with these tire companies, and so perhaps that might play into his case to show why would he rob these people if he had a meaningful job. So we were searching for these individuals because we didn't have address, we only had cities and street numbers or, you know, intersections. So we're searching for that, doing a background check on the victims to see if there is anything there. [¶] Mr. Juarez had mentioned that he was running red lights on that day because he was so worried and fearful that someone was pursuing him. My investigator is actually trying to see red light cameras on those intersections to see if we can verify that. [¶] We tried to interview the victims, they refused. They took our calls, but refused. Completely uncooperative. We've gone to the gas station, we've spoken to – well, this is where it occurred – spoken to the individuals there, did investigation there. We've spoken to his sister just to get some family history. [¶] And just briefly, the thing he had mentioned – well, two more things. He once mentioned the confidentiality of the reports. There were some – we've had him privately evaluated, and those reports are confidential. So he was told that at the time. When you enter the 1026 you lose that confidentiality. And that was explained to him at the time. So maybe he thought that perhaps that confidentiality continued. But the reports he's referring to are the ones done through the 1026 when the court appointed those physicians. And I explained that to him when I saw him last. [¶] And I think some of the frustration is those reports were going

to – didn't come out the way we may have thought they would, and others have viewed them, so there is a concern. [¶] And then he mentioned something about not feeling comfortable in some respects talking to me because I am black and there were black people involved in his case. The victims in the case are Hawaiian, they're not black. None of the material or critical witnesses are people of color. I know Mr. Juarez had mentioned that there's a motorcycle gang that's after him, after his life, and some of them may have been black, but that's the only time he's ever mentioned that. It's not an issue at all whether they are or aren't. [¶] And I told Mr. Juarez I'm prepared to represent him to the fullest of my abilities and that that is not an issue and he should feel extremely comfortable telling me anything. My job here is to help him the best way I can, which is what I'm trying to do, and that he shouldn't be concerned, you know, if he has to talk badly about black people or say something negative. I am not going to ever hold that against him ever. [¶] And he did mention something about the offer. I explained to him that unfortunately if an offer is made and he didn't – doesn't take it there is no guarantee it will be held open. He actually had a 15-year offer pre-prelim, which he did not take. Judge Fitzgerald made a 17-year offer that he did not take. The current prosecutor who was here this morning, his current offer is 19, which is the minimum. And as much as I have tried to persuade the prosecutor to reduce that offer even lower than 15, he's just not willing to do that, although I have made significant efforts to try to do that. [¶] . . . [¶] The court: He referenced he didn't feel there was a connection between the two off you. Have you sensed that at all? [¶] [Trial counsel]: I did not sense that at all. Mr. Juarez is one of my most polite, you know, easy-going clients and I thought we had a very good relationship. I know things get stressful when you get closer to trial, which is set next week. And with the offer being high, I did notice he was a little bit more frustrated, but I didn't take it as directed towards me. I thought it was just, you know, the position he was in. And I feel we have a great working relationship. I thought he thought that, too."

After hearing from Juarez and his attorney, the trial court denied Juarez’s request for substitute counsel. “When a defendant seeks new counsel on the basis that his appointed counsel is providing inadequate representation— i.e., makes what is commonly called a *Marsden* motion [citation]—the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of inadequate performance. A defendant is entitled to relief if the record clearly shows that the appointed counsel is not providing adequate representation or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result. Substitution of counsel lies within the court’s discretion. The court does not abuse its discretion in denying the motion unless the defendant has shown that a failure to replace counsel would substantially impair the defendant’s right to assistance of counsel. [Citation.]” (*People v. Smith* (2003) 30 Cal.4th 581, 604; *People v. Taylor* (2010) 48 Cal.4th 574, 599; *People v. Gutierrez* (2009) 45 Cal.4th 789, 803.)

Here, Juarez failed to meet his burden of proof. According to the record, the court followed the proper procedure, carefully listened to Juarez’s complaints, and considered the assertions of counsel. Juarez failed to persuade the court that he and his attorney were embroiled in an irreconcilable conflict such that counsel could not adequately represent him. Under the facts presented, the trial court did not abuse its discretion by denying Juarez’s motion to substitute counsel.

Denial of Request to Strike Prior Conviction

Juarez’s sentencing brief invited the trial court to vacate his strike prior for sentencing purposes. (§ 1385, subd. (a); *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).) The court declined to do so and Juarez claims the court’s denial amounts to an abuse of discretion. We disagree.

Section 1385, subdivision (a), states, “The judge . . . may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of

justice, order an action to be dismissed.” In *Romero, supra*, 13 Cal.4th at page 497, the California Supreme Court ruled a trial court may strike or vacate an allegation or finding under the Three Strikes law pursuant to section 1385, subdivision (a), if to do so would be in furtherance of justice. (*People v. Williams* (1998) 17 Cal.4th 148, 158.) The trial court’s ruling is reviewable for an abuse of discretion regardless of the court’s ultimate decision. (*People v. Carmony* (2004) 33 Cal.4th 367, 373 (*Carmony*); *Romero, supra*, 13 Cal.4th at p. 531)

Our review is guided by two fundamental principles. First, Juarez bears the burden to demonstrate the trial court’s sentence is irrational or arbitrary. (*Carmony, supra*, 33 Cal.4th at p. 376.) If he fails in this effort, we presume the trial court’s decision was based on legitimate sentencing objectives, and its determination will not be set aside by a reviewing court. (*Id.* at pp. 376-377.) Second, we do not reverse a decision simply because reasonable people might disagree. (*Id.* at p. 377.) “[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*Ibid.*)

According to the probation report, Juarez’s criminal history began in 1995, when, at the age of 23, he was convicted of misdemeanor fishing without a license. The following year, he suffered a misdemeanor vehicle theft. In 1997, he was convicted of inflicting corporal injury on his live-in girlfriend. In 1998 and 1999, Juarez was thrice convicted of driving under the influence of drugs or alcohol and driving on a suspended license. In 2003, officers responded to a gas station on a report of a suspicious person possibly trying to siphon gasoline and discovered Juarez was driving a stolen truck. Interestingly, he told the arresting officers he took the truck without permission because some unidentified people were chasing him.

The strike prior occurred in 2003, when Juarez was involved in a hit and run accident. Police officers found him in a convenience store a short time later, but he resisted arrest, failed to submit when officers used a taser gun and pepper spray in an

attempt to subdue him, and he bit one officer's arm. Juarez was under the influence of phencyclidine (PCP) at the time.

At the sentencing hearing, the court stated it had considered Juarez's sentencing brief, the prosecution's sentencing brief, and the 22-page probation report. After hearing the arguments of counsel, the court gave the following reasons for denying Juarez's motion to dismiss: "The Court does find that he's ineligible and unsuitable for probation. [¶] The Court does also find that based on his background, character, and prospects that he does come within the parameters that were intended when the three strikes law was passed. He has but one prior felony serious conviction, the current offense is serious, and so therefore – as a matter of fact, the current with the gun allegation would likely also qualify him for 85 percent only time as far as credits. [¶] . . . [¶] So then the defendant having been convicted of Counts 1 and 2 the Court does deny the motion to strike the strike based on the considerations that I've just stated, with a prior felony assault on a peace officer, prior prison terms, and the fact that a gun was used in the case. I cannot say that he does not come within the scheme for strikes and motion to strike the strike is denied."

The court followed the proper procedure in making its decision by taking into consideration the nature and circumstances of Juarez's current and prior convictions, as well as the particulars of his background. (See *People v. Carrasco* (2008) 163 Cal.App.4th 978, 993.) "[T]he record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law" [Citation.] (Carmony, *supra*, 33 Cal.4th at p. 378.) Under the circumstances, Juarez has failed to establish the court's ruling is irrational or arbitrary. (*Id.* at p. 377.)

Juarez claims the court's ruling reflects emphasis on an armed robbery that is less violent than the standard armed robbery, his prior felony conviction (assault on a police officer) is "essentially a status offense," the court failed to properly consider his mental

illness in its assessment of his background, character, and prospects, and the length of the prison term, 21 years, is “unjust.”

None of these points is persuasive. This may not have been the *most* violent armed robbery on record, but it was nevertheless dangerous and violent. Juarez used a loaded gun to deprive Padayo of \$10. No one was injured or killed, but the potential for both was certainly present. Assault on a police officer is not a status offense, it is a serious crime. (See § 1192.7, subd. (c)(1)(11).) Although the court did not expressly state it considered Juarez’s mental state at the time he committed the crime, the court was certainly aware of his trial testimony, information in the probation report and the parties sentencing briefs, and the reports of at least one mental health expert. Considering Juarez’s background, criminal history, and the circumstances of the instant offense, the trial court’s imposition of a 21-year sentence cannot be considered either unreasonable or unjust. In short, the trial court did not abuse its discretion by denying Juarez’s motion to strike.

Sentencing – Mental Illness as Mitigation

Juarez claims the trial court denied him due process of law when it failed to consider his mental illness as a factor in mitigation. We disagree.

The court was well aware of the nature of Juarez’s mental health issues. As noted, the court reviewed the probation report and the sentencing briefs filed by both parties. When a trial court says it has reviewed and considered documents addressing factors in mitigation, the court is deemed to have considered those factors, even if it does not otherwise refer to the factors in explaining its sentencing decision. (*People v. Weaver* (2007) 149 Cal.App.4th 1301, 1318.)

Juarez’s brief listed several factors to consider, including the fact Juarez committed the instant offenses while “acting under a delusional belief that his life was in danger,” and argued his culpability for the crimes should be “significantly reduced”

because of his mental condition. The trial court selected the middle term of three years for the robbery conviction because “the aggravating factors don’t weigh heavily enough to select and aggravated term,” and imposed a concurrent, low term of two years for being a felon in possession of a firearm, in consideration of mitigating factors. Thus, the record demonstrates the court expressly acknowledged the mitigating factors presented under California Rules of Court, rule 4.423(b), which included Juarez’s mental condition. Consequently, we reject Juarez’s claim the court abused its sentencing discretion.

Cumulative Error

Finally, Juarez contends cumulative error mandates reversal of the judgment. We have individually considered each claim of error and have determined none merits reversal of the judgment. We find no deprivation of rights guaranteed under either the state or federal Constitutions. Juarez was entitled to a fair trial, not a perfect one. (*People v. Box* (2000) 23 Cal.4th 1153, 1214, overruled on another ground in *People v. Martinez* (2010) 47 Cal.4th 911, 948, fn. 10.)

DISPOSITION

The judgment is affirmed.

THOMPSON, J.

WE CONCUR:

FYBEL, ACTING P. J.

IKOLA, J.